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Contracts -- Consideration -- Promise Not to Assign Note and to Keep Matter Secret

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munication is the agent of the sender to carry information,[13] but adherence to the doctrine under discussion would make it the compulsory agent of the sendee without his knowledge or consent.

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Contracts—Consideration—Promise Not to Assign Note and to Keep Matter Secret

In a recent North Carolina case[1] the widow of an insolvent defaulter signed a note not under seal to the amount of the defalcation payable to the firm from which her husband had embezzled. Her only assets at the time of the signing were moneys derived from a life insurance policy belonging to her husband, of which she was beneficiary. It was agreed that the note should be held without publicity of any kind and not turned over to any bank. In an action to enforce collection of the note it was *held* that there was no consideration to support her promise to pay. The promise to observe silence and not to assign was called "sentimental rather than valuable."

It is generally held that a note given by a widow in payment of a debt owed by her husband, who was insolvent at the time of his death, is void without a new consideration to support it.[2] Nor does the surrender of the old note provide such consideration.[3] Where the estate is solvent a different result obtains.[4] Moral obligation arising out of kinship does not ordinarily afford consideration to support a promise to pay another's debt.[5] This doctrine appears to

[13] Glynn v. Hyde-Murphy Co., *supra* note 8.

[1] People's Building and Loan Association v. Swaim, 198 N. C. 14, 150 S. E. 668 (1929).

[2] Paxon v. Niels, 137 Pa. 385, 20 Atl. 1016 (1891); Sykes v. Moore, 115 Miss. 508, 76 So. 538 (1917); Bank v. Hunter, 243 Mich. 516, 220 N. W. 665 (1928); Ferrell v. Scott, 2 Speers, 344, 42 Am. Dec. 371 (S. C., 1844); Gilbert v. Brown, 29 Ky. L. R. 1248, 97 S. W. 40 (1906); *Cf.* Shroeder v. Fink, 60 Md. 436 (1883); *Contra:* Nowlin v. Weson, 93 Ala. 509, 8 So. 800 (1891); *Cf.* Wilton v. Eaton, 127 Mass. 174 (1880); Rathfon v. Loacher, 215 Pa. 571, 64 Atl. 790 (1906).

[3] Paxon v. Niels, *supra* note 2.

[4] Steep v. Harpham, 241 Mich. 652, 217 N. W. 787 (1928); Cawthorpe v. Clark, 173 Mich. 267, 138 N. W. 1075 (1912). But *cf.* Rosenberg v. Ford, 85 Cal. 612, 24 Pac. 779 (1890); Sullivan v. Sullivan, 99 Cal. 193, 33 Pac. 862 (1893).

[5] Mortimore v. Wright, 6 Mees. & W. 482, 151 Eng. Rep. 502 (Ex. 1840); Wiggins v. Keizer, 6 Ind. 252 (1855); Schnell v. Nell, 17 Ind. 29, 79 Am. Dec. 453 (1861); Beauchamp v. Beauchamp, 198 Ky. 167, 248 S. W. 502 (1923). See, for a comprehensive discussion of this problem, 3 L. R. A. (N. S.) 437, and cases there cited.

be strictly enforced where the heirs of an insolvent debtor promise to indemnify his creditors.[6]

Seemingly there is in the instant case more than moral obligation as consideration to support the promise. The fact that the promisee obligated himself not to assign the note and to observe silence with regard to the defalcation, would seem to satisfy the technical and venerable requirement of a detriment to the promisee[7] as a surrender of a valuable privilege.

Where the parties are equally capable of self-protection, the adequacy of consideration will not be examined.[8] But where the enforcement of a contract would work a manifest injustice, and where enforcement is wholly dependent upon a completely technical consideration, courts have frequently seen fit to ignore such a consideration.[9]

In the instant case the *ratio decedendi,* probably based upon the constitutional provision for the protection of life insurance in the hands of widows,[10] seems to have brought about an eminently just result.

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[6] McKelven v. Stone, 56 Ga. 208 (1876) (holding that moral obligation was not sufficient consideration for a son's promise to pay his bankrupt father's debts, under a section of the Georgia Code declaring good consideration to be such as is founded on natural duty and affection); Parker v. Carter, 4 Munf. 273, 6 Am. Dec. 513 (Va. 1814); Beauchamp v. Beauchamp, *supra* note 5.

[7] WILLISTON on CONTRACTS, (1924) §113; Riddle v. Hudson, 68 Okl. 172, 172 Pac. 921 (1919). Notes given for the purpose of procuring abandonment of criminal proceeding are void, McMahon v. Smith, 47 Conn. 221, 36 AM. R. 67 (1882). But *cf.* Switzer v. Am. R. R. Exp. Co., 133 S. E. 98 (S. C. 1926). It is submitted in the instant case that the objection that the note is void on grounds of public policy could not arise, the criminal action dying with the embezzler.

[8] Fairchild v. Cartwright, 39 Cal. App. 118, 178 Pac. 333 (1918); Meyer v. Nelson, 69 Colo. 56, 168 Pac. 1175 (1917); Yaryan Rosin & Turp. Co. v. Haskins, 29 Ga. App. 753, 116 S. E. 913 (1923); Nolan v. Young, 220 S. W. 154 (Tex. Civ. App. 1920).

[9] Luing v. Peterson, 143 Minn. 6, 172 N. W. 692 (1919); Cotton v. Graham, 84 Ky. 672, 2 S. W. 647 (1887); Grimes v. Grimes, 28 Ky. L. R. 549, 89 S. W. 548 (1905), holding that where deceased's estate was hopelessly insolvent, his widow's promise to pay an outstanding debt against the estate was without consideration, although a creditor, in reliance thereon destroyed a note given him by the deceased; White v. Bluett 2 C. L. R. 301, 23 L. J. Ex. 36 2 W. R. 75 (1853) (forbearance on part of son to make complaints to father held no consideration, "By the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts").

[10] N. C. Const. Art. 10, §7.